REHABILITATION VS. RETRIBUTION, RESTITUTION, OR DETERRENCE.

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Resolved: Criminal justice ought to prioritize rehabilitation over retribution, restitution, or deterrence.

In the last two installments, we surveyed definitions, analyses, and philosophies pertinent to this season's resolution. Now it is time to begin synthesizing that material and discussing competitive approaches.

Part I: Dos and Don'ts for Affirmative

Let's begin with some general advice for AFF debaters.

First, AFF should take every framing advantage offered by the resolution. In the overview section, I noted that this resolution can be read two ways: conjunctively or disjunctively. Most debaters will choose to read it disjunctively, i.e., as saying merely that rehabilitation ought to be valued above one of the three alternatives (retribution, restitution, or deterrence). Unless AFF is running a spread against all three of these (see the resolutional overview for more details), it is imperative that he specify which one he is comparing with rehabilitation. Otherwise, he gives up control of the round to NEG, who can choose whichever he prefers. I would recommend writing AFF cases against retribution and deterrence. The arguments for restitution are incredibly powerful, so powerful that I will be very surprised if any debaters are still running cases against restitution by the time NITOC begins. (I could easily be wrong, but the arguments for restitution seem too persuasive to me to be consistently beatable.)

Second, AFF should avoid abolitionist positions whenever possible. In other words, AFF should not endorse erasing punishment from the criminal justice system. That is a recipe for an immediate loss due to judge bias. AFF should clarify (probably during the resolutional analysis portion of his constructive) that his position does *not* require "soft-on-crime" approaches to sentencing or prosecution. Prioritizing rehabilitation is consistent with (i) fully funding police departments, (ii) aggressively prosecuting virtually all crimes, and (iii) punishing criminals via incarceration. Do not allow NEG to foist controversial policy prescriptions on you which you have no obligation to defend. A society that vigorously hunts, prosecutes, and imprisons offenders, but that does so with the aim of upholding security through rehabilitation, still enacts the resolution.

Third and finally, AFF should avoid weaselly tactics that are designed to circumvent clash. The most common such tactic when I debated a resolution very similar to this one several years ago was to insist that rehabilitation is *entirely* compatible with punishment, so the AFF

position requires no sacrifice whatsoever. That makes for a boring, meaningless debate round. And while it is true that rehabilitation of some sort is often compatible with punishment (the question was often posed, "Why not just rehabilitate them while they are serving a proportional sentence?"), there is no criminal justice system on earth in which the two are pursued with equal zeal. That is because the *most effective* rehabilitative methods require rolling back retributive measures, either as a way of establishing trust with participants or as a way of incentivizing participation. That is why, for example, sentences are lenient in the Norwegian system, where rehabilitation programs are more effective than anywhere else in the world (more on that next week), but harsh in the United States, where there is practically no emphasis on rehabilitation. AFF should own up to this conflict. Most NEG debaters will expect you to dodge it – they will not expect you to have creative arguments on hand to manage it.

Part II: Potential Affirmative Cases

I suspect most debaters are discouraged about the prospects for AFF under this resolution. I am not. There are a great number of viable frameworks available that support rehabilitation. I cannot cover them all, but I will briefly outline three.

First, AFF may argue that rehabilitation ought to be valued above retribution because it upholds justice by preventing crime, touting the adage, "Prevention is better than cure." Most people would agree that it is better to prevent a crime from occurring than to allow it to occur and punish it afterward. Thought experiments are a helpful tool for making this evident to the judge. Just ask: Would you rather live in a society with no crime, or a society in which crime occurs but all crime is justly punished? This strategy does not require AFF to disparage retribution or to deny that it has a proper place in criminal justice; it simply requires AFF to argue that rehabilitation upholds justice better than retribution. And it will surprise NEG debaters who expect AFF to avoid talking about justice in the AC.

Second, AFF may argue that only rehabilitation is consistent with our moral duty to help the needy. There is quite a lot of empirical evidence that the majority of people in prison in the United States lack basic social competencies for various reasons, either because they are mentally ill or addicted or because they were abused or neglected as children (or all of the above). AFF may argue that this represents an especially grave kind of poverty that must be addressed, perhaps out of basic respect for human dignity. This kind of case should *not* hinge on the claim that criminals are never responsible for their actions; that will result in an instant loss under almost any circumstance. Rather, it should frame the atrocious levels of illiteracy, unemployment, addiction, and mental illness among current and former inmates as a problem – not just a practical problem, but a *moral* problem, a moral problem so grave that it constitutes a continual affront to human nature and thus demands our attention.

Third and finally, AFF may argue that rehabilitation ought to be valued above deterrence because it is a more humane way to prevent crime. A few philosophers have argued that general deterrence is incompatible with Immanuel Kant's categorical imperative, since it treats certain offenders (those being punished for the purpose of deterring the populace) as mere means to the end of preventing crime. In other words, in a deterrence-based system, penalties are inflicted on offenders because of the social benefits those penalties will bring about for *everyone else,* while the interests and the moral standing of offenders are entirely disregarded. (In principle, a committed deterrence theorist would countenance whatever punishments were necessary to deter crime, no matter how harsh.) AFF may argue that this approach denies the intrinsic value of the offender, and that attempts to reduce crime should treat offenders as ends in themselves. Rehabilitation does so by restoring offenders to productive social roles.

Part III: Dos and Don'ts for Negative

Since this resolution offers three different alternatives to rehabilitation, every debater will have to prepare three NEG cases: one for retribution, one for restitution, and one for deterrence. I expect that some NEG debaters will try to run their favorite case every round by insisting in the NC that they ought to have the right to choose which alternative they defend, not AFF. But I would caution against this approach, for at least two reasons. First, debate theorists across all formats acknowledge that AFF has the prerogative to frame the resolution in a way that determines the NEG ground. That is why it would be inappropriate in a Team Policy round for the NEG team to complain that they should be able to choose their own position instead of being compelled to respond to the AFF plan. While this relationship between AFF's framing and NEG's ground is rarely as significant in LD as it is in other formats, it is still operative. Second, AFF has an irresistible argument for his right to choose which alternative to discuss: he *must* choose one, since, in order to practice value debate properly, he must compare rehabilitation with an alternative in the AC and there is no way to know prior to the NC which alternative NEG prefers. And it would be horribly unfair if NEG were able to dismiss the entire AC simply by *picking a different position* based on what was in it.

Of course, when AFF chooses to argue against all three alternatives to rehabilitation, this problem will not arise. But in that case, NEG has a different set of problems to navigate. In the last section, I suggested that the way philosophers have tended to respond to the problem of punishment raises issues for NEG. The difficulty is that most philosophers writing about punishment consider retribution, restitution, and deterrence to be *competing* theories of criminal punishment. Thus, if AFF analyzes the resolution disjunctively and chooses to present arguments against retribution, restitution, and deterrence, NEG will have to come up with ways to show that all three are consistent. The best way to do this, I think, is to show that it is possible to rank-order all four theories in the resolution and place rehabilitation at the bottom. So, for instance, NEG might argue that retribution ought to be our highest priority, followed by restitution, followed by

deterrence, followed by rehabilitation. That way, NEG may acknowledge that retribution must occasionally be prioritized over restitution or deterrence without conceding that rehabilitation ought to be prioritized above any of them. A second solution to the problem would be to offer a conjunctive analysis of the resolution and then choose one of the three to defend. That approach would be cleaner, but it would collapse if the judge was not persuaded by the conjunctive reading.

On an entirely different note, I expect many AFF debaters this year to focus on the unusual costliness, inhumanity, and inefficiency of some parts of the American criminal justice system as justifications for sweeping reform. Just know that, as the NEG speaker, you are not in the least obligated to defend American criminal law. You may agree with your opponent that criminal justice in the United States is in dire need of reform but deny that the solution is to stop prioritizing punishment. Better yet, you may point to actual examples of retribution, restitution, or deterrence that are more just and less costly than their American counterparts. (More on applications next week.)

Part IV: Potential Negative Cases

Since there are three distinct alternatives for NEG, I will limit myself to explaining one framework for each of them. There are plenty of potential cases that do not fall under any of these, but hopefully they will help to give you a sense of the options.

The best way to defend retribution is by direct appeal to the judge's moral intuitions. Narrating hypothetical or actual cases of heinous crimes almost always gives immediate rise to retributive judgements. Practically everyone is inclined to agree, after hearing about such cases, that justice requires punishing criminals in proportion to the seriousness of their crimes. If you are not confident that a direct appeal will be effective, then bolster it using some of the arguments for retribution mentioned in the philosophy section, e.g., that retribution is necessary to condemn wrongdoing or to "level the playing field" when offenders take unfair advantage of the other members of society. These arguments will be far more persuasive as a *supplement* to intuitive appeals, so I recommend you use both.

Restitution is, by far, the easiest NEG position to defend. I know this because it is possible to do so consistently just by using a simple line of cross-examination questions:

"Is it okay to do immoral things to get what we want?"

"Is it morally wrong to treat people unjustly?"

"Do victims deserve to be compensated when they are wrongfully harmed?"

"Is it okay to force an innocent person to pay the debt of a guilty person?"

The answers to these questions are obvious (they are "no," "yes," "yes," and "no," respectively), and it follows inescapably from these answers that we are morally obligated to compel offenders to repay their victims. Full stop. I know this line of questioning is effective because I used it during the 2016-2017 NCFCA season, and the case to which it was attached went undefeated for the entire year, with the exception of a single round in which it lost in a 2-1 split to the competitor who would become the national champion the following year. That is why I say AFF should rarely, if ever, choose to compare rehabilitation with restitution: the victims' rights argument is almost impossible to refute.

Deterrence is, in my view, the toughest of the three NEG positions to defend. That is because some varieties of deterrence – in particular, specific deterrence via harsh punishment – are clearly ineffective based on the empirical evidence we have. Deterrence may also appear quite harsh and dismissive of many of the social ills that underly criminal behavior. However, deterrence has one major advantage over rehabilitation: deterrence can prevent *first* offenses, whereas rehabilitation can only prevent *repeat* offenses. Deterrence is capable, in principle, of producing a crime-free society, since it is possible, in principle, to make a life of crime so unattractive to people that honest employment is always the better option, even for those with antisocial tendencies and very few marketable skills. Rehabilitation is not capable, even in principle, of reducing the crime rate to zero, because it is only capable of addressing criminal behaviors *after they have already formed*. Deterrence prevents those tendencies from forming in the first place. And if prevention is better than cure, surely the *priority* of criminal justice ought to be to prevent first offenses, not repeat ones.

Conclusion

I hope this strategy section has satisfied those in doubt that there are viable arguments available for both sides of the resolution; in truth, I consider this to be one of the more balanced topics in recent STOA history. In the next installment, I will introduce a few applications that can be used in support of the case outlines offered here.